89-1974

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE PULITZER PUBLISHING COMPANY and EDWARD H. KOHN,
Petitioners,

VS.

CERTAIN INTERESTED INDIVIDUALS, JOHN DOES I-V, WHO ARE EMPLOYEES OF McDONNELL DOUGLAS CORPORATION, and McDONNELL DOUGLAS CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Did the court of appeals err in devising a rule construing Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. § 2510 *et seq.*, and the Fourth Amendment to establish a virtually absolute privacy right for corporate employees whose conversations are summarized or excerpted in duly filed search-warrant affidavits when access pursuant to the First Amendment and the common law has been sought by a newspaper and is unopposed by the Government?

LIST OF PARTIES

The parties to the proceeding below were the petitioners, The Pulitzer Publishing Company and Edward H. Kohn, and the respondents, identified as "Certain Interested Individuals, John Does I-V, Who Are Employees of McDonnell Douglas Corporation" and McDonnell Douglas Corporation. Thomas M. Gunn, a McDonnell Douglas Corporation vice president, was a party below but is not identified in the caption. Also appearing below was *amicus curiae* the United States.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Pulitzer Publishing Company and Edward H. Kohn respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the court of appeals (App. A, *infra,* 1a-14a) is reported at 895 F.2d 460. The opinion of the district court as amended (Cahill, J.) (App. B, *infra,* 16a-24a) is unreported. The judgment of the court of appeals denying petitioners' petition for rehearing (App. C, *infra,* 25a) is unreported.

JURISDICTION

The opinion and judgment of the court of appeals were entered on February 2, 1990, and a petition for rehearing was denied on March 23, 1990 (App. C, 25a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 41(g) of the Federal Rules of Criminal Procedure ("F.R.Crim.P."), 28 U.S.C. § 41(g), provides:

> The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

The relevant section of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. § 2510 *et seq.*, ("Title III") is:

> 18 U.S.C. § 2517. Authorization for disclosure and use of intercepted wire, oral, or electronic commmunications.
>
> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receeving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.
>
> (3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

STATEMENT OF THE CASE

1. *General background.* The Justice Department's "Operation Ill Wind" ("Ill Wind"), a nationwide investigation into procurement fraud within the Pentagon and the Department of Defense, began in late 1985 or early 1986. At the height of Ill Wind, Federal investigators placed electronic eavesdropping equipment within certain Pentagon offices as well as the offices and homes of several defense "consultants," who were in the employ of some of the nation's largest defense contractors.[1]

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[1] A major focus of the investigation was the use of confidential or "inside" bidding information obtained by the "consultants" and sold — sometimes repeatedly — to the various defense contractors.

The investigation and its scope were made public on June 14, 1988, when agents executed 44 search warrants[2] seeking evidence of fraud.[3]

To date, Ill Wind has yielded more than three dozen guilty pleas or convictions. Other defendants are awaiting trial. A grand jury empaneled by the United States District Court for the Northern District of Virginia is continuing to hear evidence and to hand up indictments.

The respondent McDonnell Douglas Corporation ("MDC") is a Maryland corporation with its headquarters in St. Louis County, Missouri. It is the nation's largest defense contractor, doing nearly $9 billion a year in work for the Defense Department. It is the largest employer of any description in the St. Louis metropolitan area, with about 40,000 employees at various locations in the area.

Two of the 44 search warrants executed on June 14, 1988, were directed at the offices of Thomas M. Gunn ("Gunn"), then an MDC vice president, and Linda Ogle ("Ogle"), then Gunn's secretary.[4] To date, no charges have been brought against MDC nor, to the best of petitioners' knowledge, the

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[2] *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 577-78 (8th Cir. 1988) (*Gunn I*).

[3] Ill Wind has been described as the largest investigation in the Justice Department's history. It involved various U.S. Attorney's offices (including that in the Eastern District of Missouri), the Federal Bureau of Investigation and the Naval Investigative Service. *See Gunn I*, 855 F.2d at 570.

[4] *Gunn I*, 855 F.2d at 570.

respondents "Certain Interested Individuals, John Does I-V" ("John Does").[3]

The petitioner, The Pulitzer Publishing Company ("Pulitzer"), publishes the *St. Louis Post-Dispatch*, a daily newspaper of general circulation in the St. Louis metropolitan area. The newspaper devotes substantial resources to writing about MDC on a daily basis, largely because of MDC's importance to and impact upon the economy of the St. Louis area. At all times relevant, the petitioner Edward H. Kohn was Pulitzer's assistant city editor for projects.

2. *Procedural history.* The search warrants against the two MDC employees, Gunn and Ogle, were authorized by the United States District Court for the Eastern District of Missouri ("district court"). The search-warrant applications, the warrants proper, the affidavits in support and the returns initially were filed under seal with the district court clerk on the application of the United States Attorney *ex parte*. In the following days, the United States Attorney assented to the disclosure of the applications, the warrants and the returns, and they were made public. However, the affidavits filed in support of the warrants remain under seal and are at the heart of this dispute.

Petitioners began this action on July 6, 1988, after their informal approach to the district court failed. They sought (and continue to seek) access to the search-warrant affidavits and any other sealed documents returned and filed under seal with the clerk of the district court. The district court initially denied petitioners' request for access on the basis of the Government's compelling interest in protecting the continuing Ill Wind investigation. This denial was upheld by the court of appeals.[4]

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[3] Although the name of Thomas M. Gunn is not included in the court of appeals' caption, it is included in the notice of appeal and in the briefs filed with the court of appeals by the respondents herein.

[4] *Gunn I*, 855 F.2d at 575.

After the United States Attorney withdrew his ojections in December 1988[7] to unsealing the Government's redacted versions[8] of the search-warrant affidavits, MDC and the John Does petitioned the district court to maintain the seal on a variety of grounds, including Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. § 2510 *et seq.* ("Title III").

Nine months later, in September 1989, the district court ordered release of the search-warrant affidavits, subject to the following redactions: (a) those portions of the affidavits which the Government requested remain sealed to protect its continuing investigation; and (b) the names and titles of the John Doe parties.[9] App. 20a-21a. The respondents appealed and the petitioners cross-appealed.[10]

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[7] At that time, the United States Attorney informed the distict court that its investigative objectives had been achieved "in part."

[8] Redacted versions of the search-warrant affidavits sought here were prepared by the United States Attorney and filed, *ex parte* and under seal, with the district judge.

[9] The district court concluded that it was unnecessary to redact the names and titles of Gunn and Melvin Paisley, as their identities were widely associated with Ill Wind and their expectations of privacy were significantly lessened. App. 20a. Nine days later, however, the district court expanded the scope of its redactions to include "the 'Paisley' material kept under seal by Judge Pratt of the District of Columbia . . . in comity with Judge Pratt's order and in recognition of the principle that a release of certain material in one district might well result in an uncontemplated impact on litigation in other areas." App. 23a.

[10] The United States Attorney's Office filed an *amicus curiae* brief and appeared in the Eighth Circuit on behalf of petitioners.

3. *The decision sought to be reviewed.* The Eighth Circuit reversed the district court's disclosure order. App. 14a. Particularizing an earlier general balancing test applied by the Second Circuit,[11] the Eighth Circuit devised a new test for deciding whether documents containing Title III material can be made public when there has been no indictment.

Under the Second Circuit's general balancing test, "[r]edaction or sealing of intercepted conversations [to protect] privacy interests is permissible if the district judge finds that important Title III privacy interests cannot otherwise be protected and such privacy interests outweight the public's interest in access." *Gerena,* 868 F.2d at 83.

The Eighth Circuit, however, held without precedent that in pre-indictment situations, privacy concerns outweigh access and require sealing — even when, as here, the Government favors access. It held that "[t]he procedural posture of the government's criminal investigation must be considered in the balancing process and that the absence of an indictment weighs heavily in favor of the privacy interests and non-disclosure." App. 12a.

Noting the absence of an indictment against the respondents, MDC and the John Does, the court of appeals ordered the affidavits sealed unless and until one or more of the respondents is indicted, at which time petitioners could renew their request for access. "[T]he pre-indictment status of the Government's criminal investigation tips the balance decisively in favor of the privacy interests and against disclosure of even the redacted versions of the search warrant affidavits *at this time.*" App. 14a (emphasis original).

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[11] *See Matter of New York Times Co.,* 828 F.2d 110, 115 (2d Cir. 1987) (*New York Times I*), *cert. denied,* 485 U.S. 977 (1988). The Second Circuit has since applied this same test on several occasions. *See e.g., In re Application of Newsday, Inc.,* 895 F.2d 74, 79 (2d Cir. 1990), *petition for cert. pending,* (Oct. Term, 1989, No. 89-1623) (*Newsday*); *United States v. Gerena,* 869 F.2d 82, 85 (2d Cir. 1989) (*Gerena*).

REASONS FOR GRANTING THE WRIT

A. The Eighth Circuit's Construction Of Title III And The Fourth Amendment As Creating Novel Rights of Privacy That Prevail Over The First Amendment Interests Of The Public And The Press Departs From This Court's Precedents And Warrants This Court's Review.

This petition involves the proper test to be applied when the public's right of access to judicial records (here, search-warrant affidavits returned and filed with the district court)[12] is challenged by a corporation[13] and several of its employees on the basis that the records contain excerpts or summaries of the employees' lawfully wiretapped conversations.[14] The Eighth Circuit's

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[12] Executed and returned search warrants and the inventory confiscated are required to be filed with the clerk of the district court where the warrants are executed pursuant to F.R.Crim.P. Rule 41(g), which provides:

> The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

[13] In addition to the John Does, MDC was a party to the proceedings below and also sought to limit access to the search-warrant affidavits, apparently on the theory that a corporation has a right of privacy in the conversations of its employees. The court of appeals did not directly address the issue of whether a corporation has such a privacy interest. This Court, however, has held that a corporation's expectation of privacy is considerably less than that of a private individual. *See California Bankers Ass'n v. Shultz*, 416 U.S. 21, 65-66 (1974) ("corporations can claim no equality with individuals in the enjoyment of a right of privacy"); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

[14] Neither MDC nor any of its John Doe employees has asserted that the intercepted conversations were "otherwise privileged" within the meaning of § 2517(4) of Title III.

new rule in answer to that question — that except in extraordinary circumstances,[15] privacy considerations always will outweigh First Amendment access interests — is strongly at odds with this Court's precedents.

Those precedents build upon a general tradition of public access to judicial information. "[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications Inc.*, 435 U.S. 589, 597 (1978) (*Nixon*). This Court also has held that the public's common law right of access is "left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 599.[16]

Further, the public has a qualified First Amendment right of access to court proceedings and records under certain circumstances. *See, e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*) (Stevens, J., concurring). When the First Amendment right is implicated, access can be denied only upon the demonstration of a "compelling governmental interest" and any denial must be "narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (*Globe Newspaper*); *accord Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) (*Press-Enterprise II*). Analyzing *Press-Enterprise II* in *Gunn I* two years ago, the Eighth Circuit held that petitioners herein, as well as the public, have a First Amendment right of access to

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[15] The Eighth Circuit's new test makes no provision whatsoever for the effects of changed circumstances (i.e., the passage of time, additional searches of the respondents, or changes in the structure or operation of MDC).

[16] The court of appeals further erred in failing to grant the requisite deferrence to the district court's weighing of the competing constitutional claims. *See Nixon*, 435 U.S. at 599.

search-warrant applications, receipts and affidavits after they are returned and filed with the clerk of the district court pursuant to F.R.Crim.P. 41(g).[17]

Nevertheless, in the present case the Eighth Circuit ruled that the public's right of access, supported by the Government, was wholly subordinate to the privacy rights of corporate employees legally wiretapped pursuant to Title III and the Fourth Amendment.

This Court originally recognized in *Katz v. U.S.*, 389 U.S. 347, 353 (1967) (*Katz*) that the Government's electronic tapping of an individual's telephone conversations constitute a "search and seizure" within the Warrant Clause of the Fourth Amendment and thus require a judically ordered search warrant. However, this Court in *Katz* noted that "the Fourth Amendment cannot be translated into a general constitutional 'right of privacy' . . . [as] the protection of a person's *general* right to privacy — his right to be left alone by other people — is . . . left

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[17] In *Press-Enterprise II*, 478 U.S. at 13-14, this Court announced the general rule that there is a qualified First Amendment right of public access if: (i) the place and process have historically been open to press and public; and (ii) public access plays a significant positive role in the functioning of the process in question.

Applying the first prong of *Press-Enterprise II*, the *Gunn I* court held that "although the process of issuing search warrants has traditionally not been conducted in an open fashion, search warrant applications and receipts are routinely filed with the clerk of the court without seal." *Gunn I*, 855 F.2d at 573. The court of appeals held that the history of public access to search warrants is embodied in F.R.Crim.P. 41(g), which requires search-warrant documents to be filed with the clerk of the issuing court. *Id.* at 572.

Applying the second prong, the Court concluded that "public access to documents filed in support of search warrants is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial and judicial misconduct." *Id.* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1982)).

largely to the law of the individual States." *Id.* at 350-351 (footnote omitted) (emphasis original).

Shortly thereafter, Congress enacted Title III, which established procedures for the issuance of wiretaps. 18 U.S.C. § 2510 *et seq.* The initial disclosure of intercepted conversations is governed by 18 U.S.C. § 2517. This section permits law-enforcement officers to, *inter alia:* (a) disclose the "contents"[18] of intercepted conversations to another officer in the proper performance of the officer's duties, § 2517(1); (b) "use such contents to the extent such use is appropriate to the proper performance of his official duties," § 2517(2); and (c) disclose the contents "while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof," § 2517(3). The legislative history of Title III notes that § 2517(2) "envisions use of the contents of intercepted communications . . . to establish probable cause to search. . . ." S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) *reprinted in* 1968 *U.S. Code, Cong. & Admin. News* 2112, 2188. *Accord United States v. Vento,* 533 F.2d 838, 854-55 (3d Cir. 1976).

The court of appeals recognized that Title III, 18 U.S.C. § 2517(2)[19] "authorizes the use of wiretap information in search warrant affidavits." App. 10a. The court further recognized that the legislative history of Title III indicates that Congress en-

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[18] Title III defines "contents" to include "any information concerning the substance, purport or meaning of that communication." 18 U.S.C. § 2510(8).

[19] This section provides:

> Any investigative or law enforcement officer who, by any means authorized by his chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

18 U.S.C. § 2517(2).

visioned use of the contents of intercepted communications to establish probable cause for the issuance of search warrants. *Id.* Although the court found that the use of Title III materials in search-warrant affidavits is permissible, it concluded that such disclosure was to a limited audience of "professionally interested stranger[s]" (quoting *United States v. Dorfman*, 690 F.2d 1230, 1234 (7th Cir. 1982)), and "not the equivalent to disclosure to the public." App. 10a-11a. Therefore, the court held, disclosure of Title III materials in a search-warrant affidavit does not make the excerpted or summarized wiretap materials public information. *Id.*

The court of appeals further held that the John Does have a right of privacy — established or confirmed by Title III and supported by the Fourth Amendment — that must be balanced against the First Amendment right of access of the public and the petitioners. App. 11a. The court of appeals, in announcing its new rule, held that because the John Doe parties had not been indicted, their privacy interests must necessarily override the access interests of the public and the press, and thus the affidavits must remain sealed. App. 14a. This unprecedented decision expands Title III privacy interests unduly, so as to bring them into conflict with First Amendment and common law access rights, and then it resolves the conflict in a way that the pertinent First Amendment caselaw does not tolerate. It should be reviewed and corrected by this Court.

B. The Conflict Among The Circuits Requires Resolution By This Court.

1. The Circuits Differ As To The Appropriate Test To Apply When The Public's Right Of Access Conflicts With An Individual's Alleged Right Of Privacy.

This Court has not ruled on the issue of the appropriate test to be applied in a public right of access case when certain parties

contend that release of documents containing summaries of intercepted wire conversations violates their right of privacy or Title III.[20] The circuits are unable to resolve this issue uniformly.

The Second Circuit has held that "where a qualified First Amendment right of access exists, it is not enough simply to cite Title III. Obviously, a statute cannot override a constitutional right." *Gerena,* 869 F.2d at 85 (quoting *New York Times I,* 828 F.2d at 115). Accordingly, the Second Circuit has held that Title III, as a statutory enactment, cannot override the public's constitutional First Amendment right to judicial records. *Gerena,* 869 F.2d at 85; *accord New York Times I,* 828 F.2d at 114-115. The Second Circuit later permitted the release of documents containing a significant amount of wiretap information. *Matter of New York Times Co.,* 834 F.2d 1152, 1154 (2d Cir.) (*New York Times II*), *cert. denied,* 485 U.S. 977 (1988).

As the court below recognized (App. 4a-5a), the circuits are in conflict on the appropriate test to be applied when the public's right of access is at odds with an individual's purported right of privacy in judicial documents (here, search-warrant affidavits)

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[20] This Court has held that the right to conversational privacy is generally protected by the Fourth Amendment's prohibition against warrantless searches and seizures. *See Katz,* 389 U.S. at 353. Nevertheless, this Court has never recognized the existence of a general constitutional right of privacy in telephone conversations. *Id.* It has recognized that constitutional and common law rights of access to judicial records may be overcome only by a "compelling governmental interest" which is "narrowly tailored" to serve that interest. *See Globe Newspaper,* 457 U.S. at 607; *Press-Enterprise II,* 478 U.S. at 14-15.

that contain excerpts or summaries of wiretapped conversations.[21]

The present case presents a particularly suitable vehicle for the Court's resolution of this conflict. The compelling need for public access to the Ill Wind search-warrant affidavits in this case has been pointed out by several courts, including the Eighth Circuit.[22] With billions of taxpayer dollars at stake, the petitioners, as well as the public, have a real and significant interest in the Ill Wind investigation as well as the manner in which it is being conducted.

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[21] To date, Ill Wind search-warrant affidavits have been ordered partially or fully released to the public by at least three district courts: *In re Application of Newsday, Inc.*, (E.D.N.Y. July 27, 1989) (No. 88MISC286), *aff'd*, 895 F.2d 74 (2d Cir. 1990), *petition for cert. pending*, (Oct. Term 1989, No. 89-1623); *Matter of Search Warrants Issued on June 11, 1988 for the Premises of Three Buildings of Unisys, Inc.*, 710 F. Supp. 701 (D. Minn. 1989), *motion for stay denied*, (8th Cir. May 26, 1989); *In re Sealed Search Warrant for Pentagon Office of Victor Cohen*, (E.D. Va. Mar. 30, 1989) (No. GJ 88-2).

[22] In his concurring and dissenting opinion in *Gunn I*, Judge Heaney observed:

> I note that the defense contract and procurement scandal in this country represents a public concern of great immediacy and magnitude. Knowledgeable United States Senators have reported that the amount of public funds involved reaches the hundreds of millions of dollars. Certainly the interest of the nation's taxpayers is such that they are entitled to know the full details of the procurement fraud as soon as possible in order to intelligently act on the matter.

Gunn I, 855 F.2d at 576 (Heaney, J., concurring and dissenting).

Further, the district court noted in its decision that "the tremendous build-up in defense spending was the 'crown jewel' of the Reagan administration and certainly the public had the right to know if there was widespread fraud and bribery in the expenditure of huge amounts of the public budget." App. 17a.

2. The Circuits Differ As To Whether Title III Permits Disclosure Of Excerpts Or Summaries Of Intercepted Conversations In Search Warrant Affidavits.

Title III, 18 U.S.C. § 2517, concerns the disclosure of intercepted wire communications and has been described by at least one circuit as "an extremely complex statute". *In re Globe Newspaper Co.*, 729 F.2d 47, 55 (1st Cir. 1984). The circuit courts have held that 18 U.S.C. § 2517(2) permits the use of wiretap information in search-warrant affidavits and other investigative and prosecutorial matters.[21] *See* App. 10a; *Gerena*, 869 F.2d at 85 (permitting use in trial briefs and memoranda); *United States v. Ricco*, 566 F.2d 433, 435 (2d Cir. 1977) (permitting use to refresh recollection of witness), *cert. denied*, 436 U.S. 926 (1978); *United States v. Rabstein*, 554 F.2d 190, 193 (5th Cir. 1977) (permitting use for purposes of voice identification), *reh'g denied*, 558 F.2d 605 (5th Cir. 1977). However, the Eighth Circuit held that such disclosure to "professionally interested stranger[s]" does not thereby amount to disclosure to the general public. App. 10a-11a.

The Second Circuit held to the contrary in *Newsday*, 895 F.2d at 77. The *Newsday* court held that while Title III "generates no right of access ... it is a non-sequitur to conclude the obverse: that Congress intended in § 2517, which relates solely to use in law-enforcement activities and judicial proceedings, to forbid public access by any other means on any other occasion." *Id.* Accordingly, the Second Circuit held, "nowhere does Title III state rules regarding disclosure of intercepted communications to the public incident to, or after, their use under § 2517." *Id.* at 78.

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[21] While it is well recognized that Title III prohibits the release of the *transcript* of the intercepted conversation prior to a hearing, Title III does not thereby prohibit the release of references to or conclusions of federal prosecutors based on their review of the transcript.

With no precedent, the Eighth Circuit announced a new rule for pre-indictment situations based loosely on the general balancing test of the Second Circuit. App. 14a. The Eighth Circuit's rule converts a general balancing test into a virtual blanket denial of access in pre-indictment situations. The result of this new rule is that the public is absolutely precluded from monitoring certain actions — or lack thereof — of law-enforcement officials.[24]

The discord among the circuits only encourages wholesale, unreserved sealing of these historically public judicial records.[25] The Eighth Circuit's new test further erodes this Court's strong affirmation of the importance and longstanding policy of public access to judicial records.

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[24] The Ninth Circuit recognized the importance of monitoring the issuance of search warrants, stating:

> [T]here must be some process by which society can monitor law enforcement officials' decisions to search or seize property beyond relying on the judgment of the neutral detached magistrate.... [W]e acknowledge that the public has a vital role to play in policing the government's use of the warrant process ....

Times Mirror Co. v. U.S., 873 F.2d 1210, 1218 n.11 (9th Cir. 1989).

[25] Indeed, in the wake of *Gunn I* the United States District Court for the Eastern District of Missouri now routinely files search warrants, returns and affidavits under seal.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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June 1990

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 89-2532/89-2593

Certain interested individuals,
John Does I-V, who are Employees of
McDonnell Douglas Corporation, and
McDonnell Douglas Corporation,
Appellants and Cross-appellees,

v.

The Pulitzer Publishing Company, and
Edward H. Kohn,
Appellees and Cross-appellants.

Appeals from the United States District Court
for the Eastern District of Missouri

Submitted: October 18, 1989

Filed: February 2, 1990

Before McMILLIAN, FAGG and BEAM, Circuit Judges.

McMILLIAN, Circuit Judge.

McDonnell Douglas Corp. (MDC), MDC vice-president Thomas M. Gunn, and several individual MDC employees (John Does I-V) (hereinafter appellants) appeal from a final order entered in the District Court for the Eastern District of Missouri redacting and disclosing certain materials that had been submitted in support of search warrant applications for two MDC offices. *In re Search Warrant for Secretarial Area,* No. 88-MISC-260 (E.D. Mo. filed Sept. 19, 1989) (clarified Sept. 28, 1989). For reversal, appellants argue the district court order improperly discloses intercepted communications to the public in violation of Title III of the Federal Omnibus Crime

Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2520 (hereinafter Title III). Appellants also argue that disclosure to the public of these materials, even as redacted, violates their constitutional right to privacy and damages their reputations. The Pulitzer Publishing Co., as the publisher of the *St. Louis Post-Dispatch* newspaper, and Edward H. Kohn (hereinafter appellees) filed a cross-appeal. They argue the district court erred in redacting the materials before disclosing them and in refusing to disclose the so-called Paisley affidavit.

For the reasons discussed below, we affirm in part and reverse in part. We affirm that part of the district court order refusing to disclose the Paisley affidavit and reverse that part of the district court order redacting and disclosing the search warrant materials as redacted. We dismiss the cross-appeal as moot.

BACKGROUND FACTS

The background facts are fully set forth in our prior opinion, *In re Search Warrant for Secretarial Area,* 855 F.2d 569 (8th Cir. 1988) (*Gunn I*). On June 14, 1988, federal agents executed 44 search warrants as part of a nationwide investigation, code-named "Operation Ill Wind," into allegations of widespread fraud and bribery within the Department of Defense and the defense industry. The nature and scope of the Operation Ill Wind investigation attracted extensive national and local news coverage.

MDC was the target of two of the Operation Ill Wind search warrants. The district court authorized searches of the offices of Gunn and his secretary. In support of the applications for search warrants for the MDC offices, the government attached an affidavit, prepared by an FBI agent, which was based in large part upon telephone conversations that had been intercepted pursuant to court-ordered wiretaps (hereinafter Gunn affidavit). Also attached to the search warrant applications was another affidavit that had been filed in the District Court for the District

of Columbia in support of a search warrant application for the Office of Melvin Paisley (hereinafter the Paisley affidavit). Due to an oversight, the search warrant for the secretarial office, description of property to be seized and the return were not sealed. However, the search warrant for Gunn's office, the attached affidavits, and all other materials were sealed at the request of the government.

In early July 1988 appellees sought disclosure of the sealed search warrant materials, including the Gunn and Paisley affidavits. The district court denied the motion to disclose and extended the sealing order for an additional 30-day period. We affirmed the district court's order in *Gunn I*. We held there was a qualified first amendment right of access to judicial documents that included search warrant materials, 855 F.2d at 572-74, but that the district court had properly refused to unseal the search warrant materials in order to protect a compelling governmental interest, that is, the government's on-going criminal investigation. *Id.* at 574. The government subsequently sought and was granted several 30-day extensions of the sealing order.

DISTRICT COURT ORDERS

On December 29, 1988, the government notified the district court, appellees and appellants that it no longer opposed the disclosure of most of the sealed search warrant materials, at least in redacted form, because "its investigatory objective [had] been attained in part." The government also filed under seal a set of already-redacted affidavits. On December 30, 1988, appellees renewed their motion for disclosure of the sealed search warrant materials. On January 11, 1989, appellants filed motions opposing disclosure of the sealed materials to the public.

On September 19, 1989, the district court granted appellees' motion to unseal the sealed search warrant materials, subject to the government's redactions and redaction of the names and titles of certain other individuals. The district court decided

that appellees' qualified first amendment right of access to judicial documents outweighed appellants' qualified fourth amendment privacy interests and ordered the sealed materials released. Order of Sept. 19, 1989, slip op. at 2-6. The district court later clarified that, in addition to the redactions set forth in its earlier order, the Paisley affidavit would remain under seal because that affidavit had been kept under seal in another district court and also deleted job titles and job descriptions from the search warrant materials to be released. Order of Sept. 28, 1989, slip op. at 1-2, *citing In re Search Warrants (William M. Galvin),* Misc. No. 87-218 (D.C. Cir. May 12, 1989). The district court also ordered job descriptions redacted from the sealed materials to be released.

The district court temporarily stayed its release order to allow appellants to appeal and seek a stay pending appeal from this court. This appeal and cross-appeal followed. We stayed the release order pending appeal.

JURISDICTION

The government has not yet indicted any of these appellants, so there is no pending criminal case. (In fact, the attorney for one of the individual Does stated in an affidavit he has been advised by the government that the government has no interest in prosecuting his client at the present time and does not anticipate any prosecution in the future.) The district court order is not interlocutory, and we need not resort to the collateral order doctrine. We have jurisdiction under 28 U.S.C. § 1291. *See Gunn I,* 855 F.2d at 572; *see also United States v. Gerena,* 869 F.2d 82, 83 (2d Cir. 1989) (*Gerena*); *United States v. Dorfman,* 690 F.2d 1230, 1231 (7th Cir. 1982) (*Dorfman*).

***GUNN I* and TITLE III**

Gunn I recognized a qualified first amendment right of access to documents filed in support of search warrant applications. 855 F.2d at 573-74 (McMillian, J.), 576 (Heaney, J., concurring

and dissenting); *cf.* 575-76 (Bowman, J., concurring) (common law right of access only). Two circuits have disagreed with that holding. *See In re Baltimore Sun Co.*, 886 F.2d 60, 64-65 (4th Cir. 1989) (no first amendment right of access to search warrant affidavit; common law right of access only); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213-19 (9th Cir. 1989) (Operation Ill Wind) (no first amendment or common law right of access to search warrant affidavits); *cf. United States v. Corbitt*, 879 F.2d 224, 228-29 (7th Cir. 1989) (common law right of access, but no first amendment right of access, to pre-sentence reports).

In *Gunn I* the opposing parties were the newspaper, which sought disclosure, and the government, which opposed disclosure. MDC and Gunn filed briefs and presented oral arguments as amici curiae and opposing disclosure. They argued that the search warrant materials presumably contained confidential information, in particular wiretap information, and that the disclosure could harm not only their privacy interests, but also national security, trade secrets, and other confidential business information. The privacy argument was not necessary to our diposition of that case, and we did not, however, reach the merits of any of these arguments in *Gunn I*. 855 F.2d at 575. Our consideration in the present case of Title III is therefore not precluded or limited by *Gunn I*.

RIGHT OF ACCESS v. RIGHT TO PRIVACY

The cast of characters in the present case is the same as it was in *Gunn I*. The government, however, now appears only in the supporting role of amicus on the side of the newspaper. Now that its investigatory objectives have, at least in part, been achieved, the government no longer opposes releasing the search warrant affidavits, as redacted, to the public. Thus, denial of the public's, and the newspaper's, qualified right of access to these documents can no longer be justified by a compelling governmental interest in protecting an on-going criminal

investigation. Appellants argue that another compelling interest justifies non-disclosure. Appellants argue that their privacy interests outweighs the public's interest in access.

Appellants argue the district court erred in releasing the redacted search warrant materials because these materials contain intercepted communications, that is, wiretap information. Appellants argue that Title III protects their interest in conversational privacy by prohibiting wiretapping except when authorized by court order and by restricting the use and disclosure of wiretap information. Appellants argue that the only way wiretap information can lawfully be disclosed to the public is through "testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof." 18 U.S.C. § 2517(3); *see Dorfman,* 690 F.2d at 1233. Appellants also argue that disclosure of the redacted search warrant materials to the public is inconsistent with another provision of Title III, 18 U.S.C. § 2518(8), which provides that the recordings of intercepted communications, wiretap applications and orders authorizing wiretaps must be sealed and that the applications and orders can be disclosed only upon a showing of good cause. *See In Re Application of National Broadcasting Co.,* 735 F.2d 51, 55 (2d Cir. 1984) (disclosure of wiretap applications and orders only for "good cause" under 18 U.S.C. § 2518(8)); *In re Applications of Kansas City Star,* 666 F.2d 1168, 1176 (8th Cir. 1981) (same).

Appellees note that they do not seek access to the *wiretap* applications or orders authorizing the wiretaps. They seek access to the *search warrant* affidavits only. Their principal argument is that the first amendment right of access to judicial documents recognized in *Gunn I* cannot be overridden by Title III, which is only a statute. *See In re New York Times Co.,* 828 F.2d 110, 115 (2d Cir. 1987) (*New York Times I*), *cert. denied,* 108 S.Ct. 1272 (1988). Appellees urge us to defer to the district court's assessment that the public's right of access to information about the government's investigation into allegations of fraud and bri-

bery in the defense department and the defense industry outweighed appellants' privacy interest, interests which had been much diminished by other, prior disclosures. Appellees also argue that Title III prohibits disclosure of the recordings or transcripts of intercepted communications, but does not bar disclosure or reference to, or conclusions drawn from, intercepted communications by investigative or law enforcement officers that are contained in the search warrant affidavits. Appellees argue that the officers' use of their knowledge of the contents of intercepted communications in search warrant affidavits is "appropriate to the proper performance of [their] official duties" under 18 U.S.C. § 2517(2). Appellees also argue that because search warrant affidavits are prepared under oath or affirmation, they fall within the 18 U.S.C. § 2517(3) exception.

On cross-appeal, appellees argue the district court erred in releasing the search warrant affidavits as redacted by the government and in keeping the Paisley affidavit under seal.

The government argues that nothing in Title III or its legislative history requires the permanent sealing of search warrant affidavits that contain wiretap information. The government argues that 18 U.S.C. § 2518(8)(a) expressly provides that only the recordings of the intercepted conversations be sealed and that 18 U.S.C. § 2518(8)(b) requires that applications for and orders authorizing wiretaps be sealed unless good cause is shown for their disclosure. The government emphasizes that in the present case disclosure of the actual intercepted communications or wiretap applications and orders is not at issue. Rather, what is at issue, according to the government, is merely the "incidental" disclosure of wiretap information in documents that are routinely filed, without seal, as a matter of public record. *See* Fed. R. Crim. P. 41(g). The government argues that nothing in Title III bars the "incidental" disclosure of wiretap information lawfully used in search warrant affidavits. The government argues that 18 U.S.C. § 2517(2) permits the use of wiretap information in search warrant affidavits and other in-

vestigative and prosecutorial uses. *See Gerena,* 869 F.2d at 85 (18 U.S.C. § 2517(2) authorizes use of wiretap information in trial briefs and memoranda), *citing United States v. Ricco,* 566 F.2d 433, 435 (2d Cir. 1977) (18 U.S.C. § 2517(2) authorizes use of wiretap information to refresh recollection of witness), *cert. denied,* 436 U.S 926 (1978), *and United States v. Rabstein,* 554 F.2d 190, 193 (5th Cir. 1977) (18 U.S.C. § 2517(2) authorizes use of wiretap information for purposes of voice identification).

We agree that the right to conversational privacy is protected by the fourth amendment. *See Katz v. United States,* 389 U.S. 347 (1967); *Olmstead v. United States,* 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting). However, the fourth amendment's protection of privacy is not absolute and "yields among other things to imperative needs of law enforcement." *Dorfman,* 690 F.2d at 1234.

> Title III was the culmination of a long battle between those who would have altogether prohibited wiretaps and the material obtained thereby and those who wanted to allow the government to use wiretap material in criminal prosecutions. In the resulting statute, Congress recognized that wiretapping could be highly intrusive of privacy; the legislation therefore specifically put strict limits on wiretapping and how it could be used. In construing the statute, it should always be remembered that "although Title III authorizes invasions of individual privacy under individual circumstances, the protection of privacy was an overriding congressional concern."

In re Application of National Broadcasting Co., 735 F.2d at 53 (citations omitted), *citing Gelbard v. United States,* 408 U.S. 41, 48 (1972) (footnote omitted).

> [Title] 18 U.S.C. § 2511 subjects to criminal and civil liability anyone who wiretaps or discloses information so obtained except as provided in Title III. Sections 2516 and 2518 provide for application to be made to a judge in order

> to obtain authorization for a wiretap and establish strict standards which must be applied by the judge in determining whether such authorization is appropriate. Section 2515 provides that wiretap evidence may not be received in evidence in any trial, hearing or other proceeding before a federal or state governmental body if disclosure of the information would violate Title III. The first two subsections of Section 2517 provide authorization to investigative or law enforcement officials to disclose and use wiretap information in the performance of their official duties and to provide wiretap information to other law enforcement officials. Section 2517(3) provides that any person who has properly obtained wiretap information may disclose such information "while giving testimony under oath or affirmation in any proceding held under the authority of the United States or of any State or political subdivision thereof." Section 2518(8)(a) provides for the sealing of the contents of intercepted communications and that the presence of the seal, or a satisfactory explanation for the absence thereof, is a prerequisite for the use or disclosure of wiretap information under Section 2517(3).

New York Times I, 828 F.2d at 114-15.

First, we do not agree that disclosure of wiretap information in search warrant affidavits is authorized by 18 U.S.C. § 2517(3) because search warrant affidavits are prepared under oath or affirmation. Section 2517(3) provides that

> [a]ny person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

In our view, however, this exception is testimonial, that is, it authorizes disclosure only "*while giving testimony.*" *Dorfman,* 690 F.2d at 1234 ("The privilege to disclose created by section 2517(3) continues in force 'while giving testimony.' "); *see United States v. Rosenthal,* 763 F.2d 1291, 1293-94 (11th Cir. 1985) (wiretap information admitted into evidence); *In re Application of National Broadcasting Co.,* 735 F.2d at 54; *United States v. Ricco,* 566 F.2d at 435.

Another provision of Title III, 18 U.S.C. § 2517(2), however, authorizes the use of wiretap information in search warrant affidavits. Section 2517(2) provides that "[a]ny investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his [or her] official duties." The legislative history of Title III indicates that Congress "envision[ed] use of the contents of intercepted communications . . . to establish probable cause to search." S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2188. We think, however, that disclosure under 18 U.S.C. §2517(2) is limited by the scope of the investigative or law enforcement officer's official duties. Thus, in the present case the FBI agents lawfully used the wiretap information to prepare the search warrant affidavits and, in performance of their official duties, lawfully disclosed the wiretap information only to others who, as noted by Judge Posner in *Dorfman,* 690 F.2d at 1234, are "professionally interested stranger[s]."

Nonetheless, disclosure to a limited audience of "professionally interested strangers" in the context of their official duties is not the equivalent to disclosure to the public. "Title III does not allow public disclosure of all lawfully obtained wiretap evidence just because a few officers are privy to its contents; if it were construed to do so, much of the statute would be

superfluous, for example, 18 U.S.C. §§ 2517(1)-(3)." *Id.* at 1234-35. We do not agree that once wiretap information is used in search warrant affidavits, it is no longer subject to Title III's restrictions upon its use and disclosure. We do not think that Title III's restrictions can be so easily avoided. The use and disclosure of wiretap information in search warrant affidavits pursuant to 18 U.S.C. §2517(2) cannot transform the wiretap information into non-wiretap information unprotected by Title III. Acceptance of this argument would create a very large loophole in Title III. This argument was rejectd by the Second Circuit in two cases involving pre-trial motions and trial briefs and memoranda containing wiretap information. *See Gerena,* 869 F.2d at 84-85 (briefs and trial memoranda); *New York Times I,* 828 F.2d at 114-15 (pre-trial motion papers). In each case the wiretap information, even though it was contained in publicly filed pre-trial or trial documents, retained both its character as wiretap information and the protections against disclosure provided in Title III.

Recognition that the right of privacy is protected by Title III does not resolve our disclosure dilemma. "[W]here a qualified First Amendment right of access exists, it is not enough simply to cite Title III. Obviously, a statute cannot override a constitutional right." *New York Times I,* 828 F.2d at 115 (footnote omitted). In the present case, two important constitutional rights conflict. Neither is absolute; each is qualified. *See Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 7-9 (1986) (first amendment); *Berger v. New York,* 388 U.S. 41, 49 (1967) (fourth amendment). The qualified first amendment right of access does not mean that these materials must automatically be disclosed. Nor does the qualified fourth amendment right of privacy, and the protections of Title III, mean that these materials must remain permanently sealed. We agree with the district court that what is required is a careful balancing of the public's interest in access against the individual's privacy interests, and we commend the district court for its efforts to protect and accommodate the conflicting interests in access and privacy.

Under the Second Circuit test discussed above, "[r]edaction or sealing of intercepted conversations [in order to protect] privacy interests is permissible if the district judge finds that important Title III privacy interests cannot otherwise be protected and such privacy interests outweigh the public's interest in access." *Gerena,* 869 F.2d at 86, *citing In re New York Times Co.,* 834 F.2d 1152, 1154 (2d Cir. 1987) (*New York Times II*); *see In re Search Warrants Issued on June 11, 1988,* 710 F. Supp. 701, 704-05 (D. Minn. 1989) (*Unisys*) (Operation Ill Wind search warrant materials redacted and then disclosed). In general, we think the test devised by the Second Circuit should be followed, with one important modification. We believe that the procedural posture of the government's criminal investigation must be considered in the balancing process and that the absence of an indictment weighs heavily in favor of the privacy interests and non-disclosure.

The status of the government's criminal investigation was not a factor in either *New York Times I, New York Times II* or *Gerena* because in each of those cases the motions for disclosure of wiretap information arose after indictment and involved either pre-trial or trial matters. *See also Dorfman,* 690 F.2d at 1231 (after indictment). However, in the present case, none of the individuals whose privacy interests may be compromised by disclosure of wiretap information has been indicted. We think the lack of an indictment is critical because.

> [w]here no indictments have issued against persons allegedly involved in criminal activity, there is a clear suggestion that, whatever their truth, the Government cannot prove these allegations. The court of public opinion is not the place to seek to prove them. If the Government has such proof, it should be submitted to a grand jury, an institution developed to protect all citizens from unfounded charges. All citizens, whatever their real or imagined past history, are entitled to the protection of a grand jury proceeding.

United States v. Ferle, 563 F. Supp. 252, 254 (D.R.I. 1983); *see also Illinois v. Abbott Assocs.,* 460 U.S. 557, 565-71 (1983) (holding state attorney general does not have special right of access to grand jury materials). *Cf. Times Mirror Co. v. United States,* 873 F.2d at 1216 (public access to search warrant materials pre-indictment would violate grand jury secrecy and not protect persons accused but exonerated by grand jury from public ridicule).

Moreover, in the absence of an indictment and a pending criminal trial, individuals whose wiretapped conversations are disclosed have no judicial forum in which they may potentially vindicate themselves or their conduct. Without an indictment, there can be no trial and, from their perspective, no acquittal. Thus,

> [w]here privacy interests in wiretapped conversations are asserted, the court must consider how disclosure of the information would affect the persons identified and society's interests in disclosure. A number of factors enter into this analysis, including the extent of public knowledge of the material, the accusatorial nature of the material, and the need for public scrutiny of the government operations disclosed in the material. The burden is on those opposing disclosure to show that the privacy interests outweigh the public's right of access. When redaction is required to protect privacy interests, it must be narrowly tailored to allow as much disclosure as is feasible.

Unisys, 710 F. Supp. at 705 (citations omitted).

In the present case, appellants have not yet been indicted even though almost 18 months has passed since the execution of the search warrants. Other individuals and corporations targeted by Operation Ill Wind search warrants have been indicted (and quite a few have already pleaded guilty or have been tried and convicted of various offenses). As we noted in *Gunn I,* the search warrant affidavits "describe in considerable detail the

nature, scope and direction of the government's investigation and the individuals and specific projects involved." 855 F.2d at 574. These search warrant affidavits implicate some individuals directly in criminal misconduct, others only indirectly. Disclosure could seriously damage their reputations and careers. Disclosure would place those individuals in essentially the same precarious position as unindicted co-conspirators. *See United States v. Anderson,* 799 F.2d 1438, 1441-42 (11th Cir. 1986) (newspaper not entitled to view document describing possible similar acts evidence or list of persons named in bill of particulars as unindicted co-conspirators), *cert. denied,* 480 U.S. 931 (1987); *United States v. Smith,* 776 F.2d 1104, 1112-15 (3d Cir. 1985) (list of unindicted conspirators sealed).

In sum, we think the pre-indictment status of the government's criminal investigation tips the balance decisively in favor of the privacy interests and against disclosure of even the redacted version of the search warrant affidavits *at this time.* This opinion in no way restricts appellees from investigating and obtaining the information contained in the search warrant materials from other sources or from seeking disclosure under the Second Circuit test, after indictment, of the wiretap information contained in the search warrant materials or other judicial documents.

Accordingly, the order of the district court is affirmed in part and reversed in part. The cross-appeal is dismissed.

A true copy.

Attest: /s/ Robert D. St. Vrain

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2532/2593EM

Certain interested individuals, John Does I-V,
who are Employees of McDonnell Douglas Corporation,
and McDonnell Douglas Corporation,
Appellant/Cross-Appellees,

v.

The Pulitzer Publishing Company and Edward H. Kohn.
Appellee/Cross-Appellants.

Appeal from the United States District Court
for the Eastern District of Missouri

JUDGMENT

(Filed Feb. 2, 1990)

These appeals from the United States District Court were submitted on the record of the district court, briefs of the parties and were argued by counsel.

After consideration, it is hereby ordered and adjudged that the order of the district court is affirmed in part and reversed in part in accordance with the opinion of this Court. The cross-appeal is dismissed as moot.

February 2, 1990

A true copy.

ATTEST: /s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

MANDATE ISSUED 3/22/90

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88 MISC 260

In Re: Search Warrant For Secretarial Area
Outside The Office Of Thomas Gunn,
McDonnell Douglas Corporation

MEMORANDUM AND ORDER

(Filed Sept. 19, 1989)

History

In early 1987, the F.B.I. began a wide-ranging investigation of bribery, fraud, and conspiracy believed to be occurring regularly in the defense contracting industry. The investigation, dubbed "Operation Ill Wind," was extensive; it included many individuals and several defense firms throughout the country. Subsequently, in June, 1988, a number of agents of the F.B.I. applied to various United States district courts in more than 15 states for search warrants of the offices and homes of a number of persons believed to have possession of records, documents, and other material pertinent to the investigation. The various district courts issued at least 20 search warrants in the District of Columbia, Virginia, California, Missouri, and in other federal district courts. They were executed by the agents of the F.B.I. and their returns filed with the courts. In most of these applications, affidavits were attached which gave the Government's rationale for the justification for the issuance of the search warrants, and in general terms outlined the basis for a likely charge against certain individuals and defense firms.

At the request of the Government, the applications for the search warrants, the accompanying affidavits and other documents, as well as the returns made by the agents after completion of the searches were all sealed and excluded from public view.

After the execution of the search warrants there were outcries of indignation from the media and litigation began immediately seeking to pierce the privacy of the documents now protected by the courts' orders sealing them from public view. Major newspapers and other elements of the media urged the courts to unseal all of the documents and permit public knowledge of their contents based on the ground that there existed a qualified first amendment right to have them disclosed. After all, the tremendous build-up in defense spending was the "crown jewel" of the Reagan administration and certainly the public had the right to know if there was widespread fraud and bribery in the expenditure of such huge amounts of the public budget.

The claim for public disclosure was met with firm opposition from the Government, which argued with earnest persuasiveness that premature disclosure of bits of evidence here and there in the various searches authorized by more than 20 United States district courts would delay, impede, and even prevent the successful prosecution of the suspects and permit alteration or destruction of documentary evidence. Thus, the Government argued that the prosecutors should have a reasonable time to peruse their evidence and perfect their cases before early release of the documents.

While a minute amount of the documentation was released, either through inadvertence or intentional release, the overwhelming majority of trial and appellate courts responded favorably to the arguments of the Government and the rest of the challenged material still remains under the protective seal of the courts.

The McDonnell Douglas Search Warrants

It is undisputed that there exists a qualified first amendment right to the documents sought to be disclosed here. *See In re Search Warrant for Secretarial Area - Gunn,* 855 F.2d at 574; *In the Matter of the Search Warrants Issued on June 11, 1988, for the Premises of Three Buildings at Unisys, Incorporated,* 710 F. Supp. 701, 705 (D. Minn. 1989). However, this does not mean that the papers must automatically be unsealed. *See In Re Search Warrant for Secretarial Area - Gunn,* 855 F.2d at 574; *In re the Matter of the New York Times Company, et al.,* 828 F.2d 110, 116 (2d Cir. 1987).

From the inception, this court has upheld the Government's position that premature revelation of the information contained in the affidavits might impede or delay the Government's investigation. In affirming this court's decision to seal the affidavit, the Eighth Circuit Court of Appeals found that there was a substantial probability that the Government's on-going investigation would be compromised by the public release of the sealed documents. *See In re Search Warrant For the Secretarial Area Outside the Office of Thomas Gunn, McDonnell Douglas Corporation,* 855 F.2d 569 (8th Cir. 1988).

At the request of petitioner St. Louis Post-Dispatch and other media, the court had heretofore released the search warrants and the returns thereto; but at the specific request of the Government the court ordered that the accompanying affidavits remain under seal. Subsequently, the Government informed the court that it no longer opposed the continued sealing of *certain* portions of the affidavits associated with the search of the office of Thomas Gunn on the ground that it had partially achieved its prosecutorial goals.

The Privacy Interests

The court notes that while the Government is now willing to permit the public release of *certain* parts of the search warrants

and documents, that release still may be subject to substantial privacy interests. "Privacy interests may be compelling enough to overcome the public's first amendment interests in disclosure." *See In the Matter of the Search Warrants Issued on June 11, 1988,* 710 F. Supp. at 704, 705. The district court must balance the public's right of access against the privacy of the parties who may be harmed by the disclosure. *See United States v. Gerena,* 869 F.2d 82, 85b (2d Cir. 1989).

The court recognizes that in today's world the mere mention of a person's name in connection with a Government investigation is enough to besmirch that person's reputation and career. While there is a presumption of innocence under the law, that presumption is eroded when alluded to in such an investigation. The court believes that the reputations of the John Does should not be smeared with an indelible brush of inuendo and suspicion, especially when the Government has failed to obtain indictments against any of those association with this search. It may well be that the Government will in time comport with its legal responsibility to produce a true bill, but until that time there should be no further dissemination of inferences of guilt. Consequently, the court believes that it would be unfair to reveal the names and descriptive titles of the individuals mentioned in the search warrant affidavits before they are indicted. Hence, this court finds that the John Does' privacy interests are significant enough to overcome the public's interest in disclosure at this time.

It is important to note there have been no indictments in connection with the McDonnell Douglas investigation. It was not the court's intention to delay the unsealing of the documents so that the situation could seethe and fester. The Government repeatedly averred that the investigation was proceeding with dispatch, and based on these assurances, the court continued the sealing of the documents in the expectation that indictments would follow, thus mooting the privacy issues. A year has come and gone . . . but no indictments.

Nevertheless, the sealing of documents must be narrowly tailored to preserve the public interest. *See Press Enterprise Co. v. Superior Court of California for the County of Riverside,* 478 U.S. 1, 13-14 (1986); *In re Search Warrant for Secretarial Area -Gunn,* 855 F.2d at 574. In view of the Government's acknowledgement that its investigatory objectives have been partially achieved, the court may now weigh the public's right to know against the privacy interests of McDonnell Douglas and the John Does. The court notes that McDonnell Douglas, Melvin Paisley, Thomas Gunn and others have been so frequently mentioned, both nationally and locally, in connection with this matter that they have greatly diminished privacy interests. Nonetheless, other redactions are appropriate.

The Government has indicated to the court that it no longer objects to the release of a redacted text of the affidavits. Accordingly, the court will permit the release of those documents and, in addition, will further redact all of the names and titles of individuals and entities whose privacy interests have not been diminished by prior publication.

While the court recognizes that the information it intends to release is not full and complete, it is consistent with the decision in *In the Matter of Search Warrants Issued on June 11, 1988 for the Premises of Three Buildings at Unisys, Inc.,* Misc. No. 4-88-35, District of Minnesota, and balances the competing constitutional claims. Accordingly,

IT IS HEREBY ORDERED that the following documents shall be released in redacted form on Friday, September 22, 1989, at 12:00 Noon, unless otherwise directed by the Eighth Circuit Court of Appeals.

1. a. The search warrant for the offices of Thomas Gunn.

   b. Description of premises.

   c. Property description (redacted).

d. Application and affidavit for search warrant for the offices of Thomas Gunn.

e. Description of premises.

f. Affidavit of Rebecca A. Reinhart (redacted).

2. a. Application and affidavit for the search warrant for the secretarial area outside the offices of Thomas Gunn.

b. Description of premises (previously released).

c. Property description (redacted).

d. Affidavit of James T. Haggerty.

The original, unredacted documents still remain under seal by order of the court.

Dated this 19th day of September, 1989.

/s/ Clyde S. Cahill
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-MISC 260

In Re: Search Warrant For Secretarial Area
Outside The Office Of Thomas Gunn,
McDonnell Douglas Corporation.

ORDER

The court has carefully considered the motions of McDonnell Douglas, the John Does, and other litigants for a stay of the unsealing of certain redacted portions of the search warrant affidavits at issue in this matter and the objections thereto. The court now hereby orders that the redacted search warrant affidavits remain sealed until September 28, 1989, so that an appeal may be directed to the Eighth Circuit Court of Appeals.

SO ORDERED.

Dated this 21st day of September, 1989.

/s/ Clyde S. Cahill
United States District Judge

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In Re: Search Warrant For Secretarial Area
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ORDER

(Filed Sept. 28, 1989)

This order is meant to clarify the previous order of September 19, 1989, in which the court indicated that it would release previously sealed material on September 22, 1989 unless otherwise directed by the appellate court.

This court will not release any material which the Government has sought to be kept under seal. It will only release the redacted material in conformity with the redacted documents supplied by the Government.

In addition to the continued sealing of all material that the Government has requested to be kept under court seal, the court has also eliminated the names, titles, and job positions of certain other named individuals generally referred to as "John Does" in the pleadings.

The "Paisley" material kept under seal by Judge Pratt of the District of Columbia will also remain under seal here in the Eastern District of Missouri in comity with Judge Pratt's order and in recognition of the principle that a release of certain material in one district court might well result in an uncontemplated impact on litigation in other areas.

SO ORDERED.

Dated this 28th day of September, 1989.

/s/ Clyde S. Cahill
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos 89-2532/2593

Certain interested individuals, John Does I-V, etc., et al.,
Appellants,

v.

The Pulitzer Publishing Company, et al.,
Appellees.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

Appellees/cross-appellants' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

March 15, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

No. 89-1974 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE PULITZER PUBLISHING COMPANY AND EDWARD H. KOHN,

Petitioners,

v.

CERTAIN INTERESTED INDIVIDUALS, JOHN DOES I-V, WHO ARE EMPLOYEES OF MCDONNELL DOUGLAS CORPORATION AND MCDONNELL DOUGLAS CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the court of appeals correct in holding, when a grand jury investigation is still continuing, that the privacy rights of the unindicted respondents outweigh a newspaper's qualified right to inspect sealed search warrant affidavits, prepared by federal investigators, which could seriously damage the reputations and careers of those persons and which consist largely of interpretations selectively made from conversations intercepted pursuant to Title III electronic surveillance over two years ago?

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Constitution, Statutes, and Other Authorities:

No. 89-1974

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WHO ARE EMPLOYEES OF MCDONNELL DOUGLAS
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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Respondents John Does I-V, Thomas M. Gunn and McDonnell Douglas Corporation ("MDC") respectfully pray that this Petition for a Writ of Certiorari be denied.[1] The question raised by the Petition is not in fact presented by the decision below. As shown by our restatement of the question presented, the decision below rests on the application of existing principles to the specific factual situation before the court. The Eighth Circuit

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[1] Pursuant to Rule 29.1, Respondent McDonnell Douglas Corporation states that it is a publicly held corporation which has no parent company and no subsidiaries except those which are wholly-owned. The John Doe respondents, who are all MDC employees, will submit their actual names under seal to the Court if so requested.

made no novel legal or policy decision of general impact, and its decision created no genuine issue of lack of uniformity. There is nothing in the decision below which merits, much less requires, plenary review by this Court.

STATEMENT OF THE CASE

The Petition skims by, or flatly misstates, certain aspects of the facts which are material to the decision below and the reasons why this case does not merit review on certiorari. A brief restatement of the case is therefore necessary.

Background

In connection with a wide-ranging FBI investigation into the defense contract industry known as "Ill Wind," in June 1988 United States district courts located in several states issued at least 40 search warrants. Two of these, issued by the United States District Court for the Eastern District of Missouri, authorized the search of the office of Thomas M. Gunn, an employee of MDC, and the secretarial area outside his office. At the request of the United States, the affidavits and documents supporting the search warrants were filed under seal in most of the districts where Ill Wind searches were executed. The government had the search warrant affidavits sealed in the instant case.

More than two years have passed since those searches, and no indictments involving MDC or its employees have been returned. There has been a lengthy post-search investigation, and accordingly the allegations in the sealed search warrant affidavits, based upon information and beliefs existing at the time of the search, could be entirely different from the state of the government's knowledge now. They represent its understanding or interpretation of circumstances over two years ago, prior to interviewing numerous witnesses and reviewing thousands of documents and

material supplied by MDC in cooperation with government representatives.[2]

The investigation is still continuing. The record indicates, however, that the government has decided *not* to prosecute one of the respondents, an MDC employee, whose activities and conversations are included in the affidavits. The record also indicates that the government has made no decision to seek any indictment of the other respondents.

Respondents have never been allowed to see the affidavits at issue or any parts thereof. The courts below examined the affidavits and noted that they are composed almost entirely of detailed and extensive excerpts from (and references to) oral and telephone communications which were intercepted through wiretaps and electronic surveillance under the federal wiretap statute, 18 U.S.C. § 2510 *et seq.* ("Title III"). *See* Petitioners' Appendix ("App.") A-13 & A-14; *see also In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 574 (8th Cir. 1988) ("*Search Warrant I*") ("[v]irtually every page contains multiple references to wiretapped conversations"); *id.* at 571 ("redaction on a line-by-line basis was impracticable because of the complex and interrelated nature of the allegations and the large number of individuals and activities involved").

Petitioners' repeated statement that these conversations were "legally" or "lawfully" wiretapped (Pet. 9, 11) is somewhat misleading and begs several questions. Precisely because the investigation of respondents has not resulted in any prosecution, they have not been, and may never be, involved in any proceeding in which they could file a motion testing the legality of

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[2] The dated nature of the affidavits and respondents' unindicted status stand in sharp contrast to much of the Justice Department's Ill Wind investigation. As petitioners point out, more than 35 prosecutions have resulted from this investigation.

the wiretaps, as provided for in Title III. *See* 18 U.S.C. § 2518(10(a).

Petitioners Pulitzer Publishing Company, publisher of the *St. Louis Post-Dispatch,* and its employee Edward H. Kohn (collectively "Pulitzer") instituted an action for access to the sealed search warrant documents by opening a miscellaneous docket number in the District Court for the Eastern District of Missouri and filing a motion for access in July 1988. The district court ordered that the documents remain under seal, and in *Search Warrant I* the Eighth Circuit affirmed, with respondents appearing as *amici curiae.* 855 F.2d 569.

Back in the district court some time later, the government apparently abandoned its previous position that grand jury secrecy, individual privacy interests and the federal wiretap statute precluded public release. It informed the district court that because it "had partially achieved its prosecutorial goals," it would not actively oppose the public release of certain portions of the affidavits in this case, but it suggested that the court should consider the privacy interests of the persons named in the materials and took no position as to whether those interests justified continued sealing. Respondents thereafter participated in the proceeding with the standing of parties.

In September 1989, after a renewed motion for access by Pulitzer, the district court ordered the release of portions of the affidavits and associated documents, with certain limited redactions. The district court did not address in any way the Title III and Fourth Amendment interests affected by the electronic surveillance. *See* App. B.

The Decision Below

The Eighth Circuit reversed and ordered that the affidavits remain under seal. 895 F.2d 460. The court examined the Congressional intent to preserve privacy and the statutory structure of Title III. App. A-8 to A-11. It balanced privacy interests

against a qualified First Amendment right of access, App. A-11, taking particular note of the pernicious effects of disclosure of wiretapped conversations on unindicted individuals. App. A-12 to A-13. After referring to its observations in *Search Warrant I* about the detailed nature of the affidavits and the pervasive presence of Title III material, establishing that there was no less restrictive means of protecting respondents' privacy interests, the Eighth Circuit observed that disclosure "could seriously damage" the reputations and careers of various individuals. App. A-14.[1]

Most importantly, the court limited its conclusion that the affidavits should remain sealed to the pre-indictment period: "[T]he pre-indictment status of the government's criminal investigation tips the balance decisively in favor of the privacy interests and against disclosure of even the redacted versions of the search warrant affidavits *at this time.*" App. A-14. The Court of Appeals expressly did not restrict post-indictment access or Pulitzer's ability to investigate other sources and publish anything it discovers. *Id.*

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[1] This conclusion was not speculation; it was based on the court's *in camera* review of the affidavits.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The reasons for granting the writ propounded by the Petition basically depend on a series of mischaracterizations of the decision below. Any objective review of that decision demonstrates that the Eighth Circuit did not create any novel rights, did not depart from this Court's First Amendment precedents, and did not create any conflict among the circuits. The decision below simply applies existing rights and precedents to review and reverse a faulty exercise of discretion by a district court. It does not thereby present any issue which merits plenary review.

I. THE EIGHTH CIRCUIT DID NOT CREATE OR EXPAND ANY PRIVACY RIGHTS.

Pulitzer misdescribes the decision below and fails to acknowledge this Court's precedents affirming the privacy rights which exist here because (a) the affidavits are rife with electronic surveillance material, and (b) respondents have not been indicted. Thus, the repeated claim that the Eighth Circuit created or extended some novel right to privacy (Pet. 11-13) is simply not accurate.

The Eighth Circuit applied this Court's teachings that respondents have a constitutionally-based privacy interest in not having their conversations intercepted by electronic surveillance. App. A-8. "As a means of espionage," wrote Justice Brandeis more than 60 years ago, "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping." *Olmstead v. United States,* 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting). More recently, this Court held that warrantless wiretaps are unreasonable searches in violation of the Fourth Amendment, *Katz v. United States,* 389 U.S. 347 (1967), and reversed a conviction founded on the fruits of a wiretap warrant that left the government with discretion about how and when to use seized conversations. *Berger v. New York,* 388 U.S. 41 (1967).

The Eighth Circuit also applied a Congressionally-recognized privacy interest. App. A-8 to A-9. In direct response to *Katz* and *Berger*, Congress enacted Title III, which embodied the constitutionally-based privacy interest and created a comprehensive statutory structure for the regulation of electronic surveillance. Congress stated that "[t]he privacy of the communication to be protected is intended to be comprehensive," S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968), *reprinted in* 1968 *U.S. Code Cong. & Admin. News* 2112, 2179, and that "[o]nly by striking at all aspects of the problem can privacy be adequately protected." *Id.* at 69, 1968 *U.S. Code Cong. & Admin. News* at 2156. As this Court has stated, "[A]lthough Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern." *Gelbard v. United States*, 408 U.S. 41, 48 (1972).

Finally, as the Eighth Circuit recognized (App. A-12 to A-13) and as Pulitzer ignores, at the current stage of the government's investigation respondents have an established privacy interest in not being publicly associated with alleged wrongdoing. The current situation is analogous to a grand jury proceeding, and one policy underlying grand jury secrecy is "to protect the innocent accused who is exonerated from the disclosure of the fact that he has been under investigation." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 n.10 (1979) (*quoting United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)). *See also United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 n.6 (1958). This policy protecting privacy is based on the well-founded concern that premature disclosure of investigatory materials will irreparably injure private persons:

> In their quest for information grand juries often acquire reams of documents and hours of testimony later to be found irrelevant to the investigation or the final charge. Its wholesale disclosure could be embarrassing, if not destructive of third parties or of unindicted individuals and cor-

> porations concerned when witnesses are called upon to testify or furnish evidence which involves them. This is one of the principal reasons why grand jurors are sworn to secrecy.

Illinois v. Abbott & Associates, Inc., 460 U.S. 557, 564 n.8 (1983) (quoting the district judge). *See United States v. Smith*, 776 F.2d 1104, 1114 (3d Cir. 1985) (recognizing these privacy interests in unindicted co-conspirators); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1216 (9th Cir. 1989) (recognizing that these privacy interests apply to search warrant materials).

Thus, the Eighth Circuit simply recognized that, at this stage of the government's investigation, respondents and other unindicted third parties have privacy rights in having the affidavits remain under seal which are based on Fourth Amendment principles, the demonstrated Congressional intent in Title III, and other well-settled policies. There is nothing in the decision below which suggests the adoption of a novel or expanded right of privacy, and the court below certainly did not create a general federal right to privacy in contravention of anything in *Katz*. *Compare* Pet. 14 n.20.[4]

II. THE EIGHTH CIRCUIT'S HOLDING THAT PRIVACY INTERESTS OF UNINDICTED PERSONS IN PERSONAL AND BUSINESS CONVERSATIONS OUTWEIGH ANY QUALIFIED RIGHT OF ACCESS TO SEARCH WARRANT AFFIDAVITS AT THIS TIME IS COMPLETELY CONSISTENT WITH THIS COURT'S FIRST AMENDMENT PRECEDENTS.

The balance between respondents' privacy interests and Pulitzer's claimed right of access struck by the Eighth Circuit is

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[4] We note that MDC as well as the individual respondents plainly has privacy rights that would be affected by the disclosure sought by Pulitzer. *Compare G.M. Leasing Co. v. United States*, 429 U.S. 338, 353-54 (1977) *with* Pet. 9 n.13.

fully consistent with the First Amendment decisions of this Court. Indeed, in light of the precedents concerning electronic surveillance and grand juries, this Court's cases required the Eighth Circuit to hold exactly as it did. The Petition does not raise any issue of importance concerning the scope of the First Amendment; it merely quarrels with a particular result.

The First Amendment right of access asserted by Pulitzer is not absolute. *Globe Newspaper Co. v. Superior Court for the County of Norfolk,* 457 U.S. 596, 606 (1982). If closure "is essential to preserve higher values" and is narrowly tailored to serve these values, the court has an obligation to close the proceedings. *Press-Enterprise Co. v. Superior Court of California, Riverside County,* 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*").

This Court has recognized that privacy interests are "higher values" that may outweigh a public right of access even under this strict scrutiny. For example, in *Press-Enterprise I* the Court acknowledged that legitimate privacy concerns of prospective jurors may outweigh the public's right to attend *voir dire* or even to get a transcript of that part of the *voir dire.* 464 U.S. at 512. *See Waller v. Georgia,* 467 U.S. 39, 48 (1984) (noting that in certain circumstances privacy interests may well justify closure of suppression hearing); *cf. Globe Newspaper Co.,* 457 U.S. at 609.

The Eighth Circuit balanced the specific, recognized constitutional and statutory privacy rights of unindicted persons against the qualified right of access to search warrant materials asserted by Pulitzer.[5] It made a specific determination that the balance

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[5] There is nothing novel about reliance on Congressional intent in striking a balance concerning press access to documents. Both the majority opinion and the separate opinion of Justice White in *Nixon v. Warner Communications Inc.,* 435 U.S. 589 (1978), relied on the existence of a statute governing disclosure to deny access sought under the common law. In *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 600 n.5 (1980), Justice Stewart, concurring, wrote: "This is

tipped sharply in favor of respondents' privacy.[6] The decision below, barring disclosure of the search warrant materials directed at unindicted persons and filled with Title III and other private information, is narrowly tailored to preserve the interests that justify sealing. It stands in sharp contrast, for example, to the blunderbuss sealing condemned in *Press-Enterprise I*, 464 U.S. at 513. Contrary to Pulitzer's assertions, the Eighth Circuit did not fashion a new rule that privacy considerations always outweigh access interests (Pet. 9-10); rather, it applied this Court's First Amendment cases to the specific issue of access to Title III material during the investigatory period.[7] It

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not to say that only constitutional considerations can justify such restrictions [on rights of access to proceedings]. The preservation of trade secrets, for example, might justify the exclusion of the public from at least some segments of a civil trial." *See also Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (recognizing deference due to Congressional decision in face of First Amendment challenge).

[6] The interference with privacy interests created by electronic surveillance is, of course, truly frightening. As the Senate Judiciary Committee put it: "Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage." S. Rep. No. 1097, 90th Cong., 2d Sess. 69 (1968), *reprinted in* 1968 *U.S. Code Cong. & Admin. News* 2112, 2154. Moreover, the very nature of a wiretap is that it overhears and records indiscriminately the thoughts and beliefs of the just and the unjust alike. The conversations of anyone who calls into a tapped phone, or speaks on bugged premises, are gathered into the net.

[7] The result below is also fully consistent with this Court's decision on the common-law right of access. The common-law right to inspect and copy judicial records is not absolute. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). Moreover, this Court has never suggested that a district court considering any access right must be deferred to when it totally ignores recognized privacy rights such as the conversational privacy rights implicated by wiretapping. *Compare* Pet. 10 n.16.

thus did exactly what this Court directed when it stated, in a different context in *The Florida Star v. B.J.F.*, 491 U.S. ____, 109 S. Ct. 2603, 2609 (1989), that "the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."

This Court's First Amendment access decisions do not require any process more favorable to access than that used by the Eighth Circuit and do not compel any different result. *See also Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (upholding protective order based on privacy interests which prohibited publication of materials obtained through discovery); *The Florida Star v. B.J.F.*, 109 S. Ct. at 2609-10 (approving the confidentiality of proceedings as a way to protect privacy rights); *Butterworth v. Smith*, ____ U.S. ____, 110 S. Ct. 1376, 1381-82 (1990) (acknowledging the substantial interest that unindicted persons should not suffer public disclosure of accusations and distinguishing an order restricting use of information obtained through the judicial system from a permanent ban against publicizing information obtained independently); *Rowan v. United States Post Office Department*, 397 U.S. 728, 736 (1970) (upholding statute allowing recipients to require removal from mailing list, based on "right of every person to be let alone"); *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988) (privacy interests justified sealing portion of plea agreement); *United States v. Smith*, 776 F.2d at 1113-14 (sealing based on privacy interest upheld).

Pulitzer's references to the "compelling" need for public access to Ill Wind search warrants (Pet. 15) and the assertedly dire consequences of the decision below (Pet. 17) are plainly exaggerations that do not transform an unmeritorious Petition into a matter deserving this Court's attention. As Pulitzer elsewhere admits, the press and the public have had and continue to have plenty of opportunities to monitor the Ill Wind investigation because it has resulted in dozens of public prosecutions.

Most importantly, the limited sealing directed by the decision below does not absolutely insulate anything from public scrutiny. The frailty of Pulitzer's wild assertions is exemplified by its reliance on *Times Mirror,* which squarely rejects pre-indictment unsealing. *See also Watkins v. United States,* 354 U.S. 178, 200 (1957) (public right to be informed concerning workings of government "cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals"); *United States v. Smith,* 776 F.2d at 1114-15 (rejecting similar argument for unsealing).

III. THERE IS NO CONFLICT IN THE CIRCUITS WITH RESPECT TO THE ISSUE DECIDED BY THE EIGHTH CIRCUIT.

Pulitzer's claims that the decision below demonstrates a lack of uniformity in the circuits are almost entirely specious.[8] The issue decided by the Eighth Circuit was simply whether the privacy interests of unindicted persons in their wiretapped conversations justified continued sealing of wiretap materials during the pendency of a grand jury investigation. Petitioners do not point to a single circuit decision which even deals with this issue, much less one which contradicts the Eighth Circuit's decision that the particular privacy interests applicable to this situation are sufficiently compelling to deny immediate press access. The Ninth Circuit denied pre-indictment access in *Times Mirror.* Certainly all of the district court cases in which Ill Wind search warrant affidavits have been released (Pet. 15 n.21) were treated by those courts as *post-indictment* (indeed, post-guilty plea) disclosure to the public.

[8] There appears to be a difference among the circuits as to the exact nature of the right of access, if any, which attaches to search warrant affidavits, but this appearance is largely a function of differing factual situations. *No* circuit has ordered pre-indictment public disclosure of Title III material. Moreover, the Eighth Circuit recognized a qualified First Amendment right of access but concluded that even under that standard — the most favorable access standard ever recognized — Pulitzer was not entitled to unsealing at this time. Pulitzer was not aggrieved by the access standard used by the Eighth Circuit and therefore has no standing to suggest review on the basis of that issue. *See Connecticut Railway & Lighting Co. v. Palmer,* 305 U.S. 493, 496 (1939); *Vasquez v. United States,* 454 U.S. 975, 977 n.3 (1981) (Stevens, J.); *United States v. Lovett,* 328 U.S. 303, 320 (1946) (Frankfurter, J., concurring).

The insinuation that the Eighth Circuit applied a different test of public access than that used by the Second Circuit is palpably wrong. The Eighth Circuit followed the Second Circuit approach. *Compare* Pet. 14 *with* App. A-11. Applying that test, both Circuits hold that sealing is permissible to protect Title III interests and that the right of privacy incorporated in Title III should weigh heavily in a court's balancing process. *In re New York Times Co.,* 834 F.2d 1152, 1154 (2d Cir. 1987); *see* App. A-12.

The claim that the decision below creates a conflict among the circuits as to whether Title III permits disclosure of intercepted conversations in search warrant affidavits (Pet. 16) is equally miscast. The Eighth Circuit expressly approved the use of Title III materials in such affidavits. App. A-10. At the risk of repetition, all the Eighth Circuit held was that nothing in Title III directly authorizes *public* disclosure now (App. A-9 through A-11), and that society's interests, including the conversational privacy rights recognized by Title III and the Fourth Amendment, outweigh a newspaper's interest in access *at this time* (*Id.* at A-14). The Eighth Circuit did not hold that Title III totally forbids public access to search warrant affidavits (*Id.*).

Pulitzer does not point to a single case addressing, much less resolving in a contrary manner, the issue actually decided by the Eighth Circuit. The cases it cites as allowing the use of wiretap information for law enforcement activities (Pet. 16) do not hold that such disclosure amounts to disclosure to the general public and therefore do not conflict with any statement or holding of the Eighth Circuit.

The decision below does not conflict with anything in *In re Application of Newsday, Inc.*, 895 F.2d 74 (2d Cir.), *cert. denied*, ____ U.S. ____, 110 S. Ct. 2631 (1990). That case is necessarily different and in some sense unrelated because it involved access to wiretap materials after a guilty plea. The Second Circuit did not, as Pulitzer suggests, hold that the use of wiretap information for law enforcement activities amounted to disclosure to the general public. Indeed, a petition for certiorari was filed in the *Newsday* case based in part on the alleged conflict with the decision below, and it has already been denied.[9]

[9] A petition for rehearing has been filed in the *Newsday* case. Its claim of conflict with the decision below, resting as it does on the same over-generalized characterization of the Eighth Circuit decision as Pulitzer employs, is no more persuasive than the original *Newsday* petition for certiorari.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

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